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No. 354

In the

Supreme Court of the United States

AUBREY AEBY and NORENE AEBY,
Petitioners,

v.

UNITED STATES OF AMERICA,
Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FIFTH CIRCUIT AND BRIEF IN SUPPORT THEREOF

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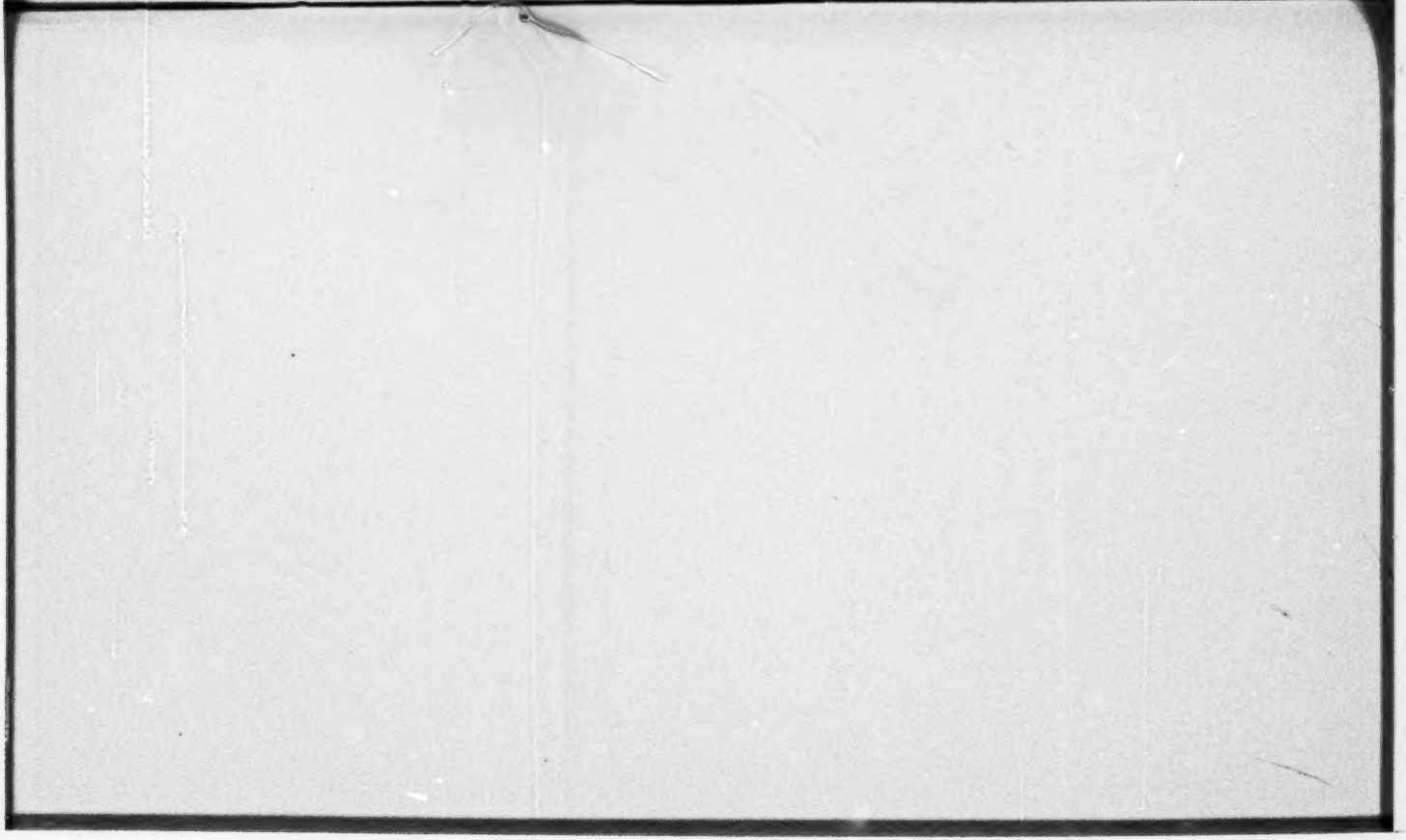

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PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FIFTH CIRCUIT

To the Honorable, the Supreme Court of the United States:

Now comes Aubrey Aeby and Norene Aeby, hereinafter called Petitioners and apply for a Writ of Certiorari to the United States Circuit Court of Appeals for the Fifth Circuit at New Orleans, Louisiana, to review a judgment entered in said cause on June 30, 1953, affirming a judgment against Petitioners entered in the United States District Court for the Northern District of Texas, Dallas Division, on August 17, 1952, and in support of their petition, respectfully represent:

STATEMENT OF THE CASE

Petitioners were charged by indictment in two counts, with having violated the Harrison Anti-Narcotic Law and the Import and Export Drug Act. The first count charged a violation of *Section 174, Title 21, U. S. C. A.*, while the second count charged Petitioners with having violated *Section 2553 (A), Title 26, U. S. C. A.* Each count alleged that the offense occurred at the same time and grew out of the same transaction involving same alleged heroin. The case was tried to a Jury on August 18, 1952, and resulted in a verdict of guilty as to both Petitioners. The Trial Court while imposing sentence upon Petitioners under and by virtue of the provisions of *Title 26, 2557, Paragraph B-1*, which provides for enhanced punishment, did not impanel a Jury, to pass upon the issue of identity as required by said statute, did impose a 20-year sentence of imprisonment upon Petitioner, Aubrey Aeby and a 10-year sentence upon Petitioner, Norene Aeby. Petitioners gave written notice of appeal within the time prescribed by law and in due time, the cause was submitted and heard by the United States Court of Appeals for the Fifth Circuit at New Orleans, Louisiana, which said Court did on June 30, 1953, affirm the judgment and sentence of the Trial Court, Chief Judge Hutcheson dissenting in part and concurring in part. Both Petitioners during the trial of their said cause after the Government had put on all of its evidence and rested its case, filed in writing a Motion for a Judgment of Acquittal on the grounds that the evidence submitted by the Government was wholly insufficient. Chief Judge Hutche-

son dissenting, his dissenting opinion agreeing with Petitioner, Aubrey Aeby's contention that the evidence as to him was insufficient.

That after the affirmance of the conviction, Petitioners filed a Motion for a Rehearing and thereafter the Honorable United States Court of Appeals for the Fifth Circuit did on August 26, 1953, overrule Petitioner's Motion for a Rehearing, Chief Judge Hutcheson concurring in part and dissenting in part and no written opinion was filed in the Court's disposition of the Motion for a Rehearing, so therefore, the judgment is now a final judgment and no further remedies are available to Petitioners other than to have this Honorable Court review the decision and judgment of the United States Court of Appeals for the Fifth Circuit at New Orleans.

Petitioners are now on bail and have been pending the appeal and a Motion has been filed with the United States Circuit Court of Appeals, requesting a Stay of the Mandate, pending this petition, and Petitioners pray this Court that if this petition is granted that the Supreme Court Order a Stay of the Mandate pending the final disposition of this case in the Supreme Court of the United States.

REASONS RELIED UPON BY AUBREY AEBY FOR ALLOWANCE OF THE WRIT

1. He is being deprived of his liberty without due process of law contrary to the Fifth Amendment of the Constitution, because there is not one scintilla of evidence, either direct or circumstantial in the Record to support the verdict

of the Jury, therefore, his Motion for Judgment of Acquittal should have been granted.

2. He was deprived of a fair trial in that the Government was permitted over objection to place his reputation in issue before the Jury when it had not been put in issue by Petitioner.

3. He was deprived of a fair trial when over objection, the Court permitted the Government to put in evidence before the Jury, highly prejudicial testimony against him.

REASONS RELIED ON BY NORENE AEBY FOR ALLOWANCE OF THE WRIT

1. She was deprived of her liberty without due process of law in that she is being convicted without sufficient evidence and her Motion for Judgment of Acquittal should have been granted, the Government, failing to prove that the alleged heroin was such, and the Government permitted a witness to testify as an expert, who had not been qualified.

2. She was deprived of a fair and impartial trial in that the Government was permitted over timely objection to comment upon her failure to testify before the Jury, she not testifying in her own behalf.

REASONS RELIED ON BY BOTH PETITIONERS, AUBREY AEBY AND NORENE AEBY FOR ALLOWANCE OF THE WRIT

1. Both Petitioners urge that the witness, J. E. Spillman, offered by the Government to prove the alleged contraband

was heroin was not qualified by the Government as an expert and over the objection of Petitioners, his testimony was allowed to stand and be considered by the Jury. Although this point is also raised under No. 1, failure to sustain "Motion For Judgment of Acquittal" it was raised specially and a special point was made of it for consideration before the United States Court of Appeals and since a Motion to strike said testimony was made in the Trial Court, Petitioners deem it appropriate to urge it in a separate point in this petition.

2. Both Petitioners urge that the Trial Court's charge was wholly insufficient; that their positions before the Jury were in some parts wholly separate and distinct and the Court's charge operated to their great prejudice; the Court's charge to the Jury was so wholly inadequate as to deprive them of a fair trial; that the Jury had no instructions whatever from the Court applicable to the facts of the case and his charge being so deficient, wholly and totally failed to protect the rights of Petitioners.

3. Both Petitioners urge that their Motion to Dismiss the Indictment should have been sustained, or in the alternative, to delete from the second count, the words "and have in their possession" a certain quantity of heroin. The faulty wording of the Indictment being read to the Jury coupled with the inadequate charge thereon by the Trial Court completely deprived Petitioners of a fair trial.

CONCLUSION

The decision of the Court of Appeals, Fifth Circuit at New Orleans, committed reversible error in its failure as

a reviewing Court to hold that the indictment was defective and to notice the other errors pointed out in Petitioner's brief, in order to determine whether the Petitioners had received a fair and impartial trial in the United States District Court at Dallas. The effect of such opinion of the United States Court of Appeals is to sanction the rulings and actions of the Trial Court in its ruling that Aubrey Aeby ought to be convicted on no evidence whatsoever and in its admitting prejudicial error to be introduced against Aubrey Aeby, and in its permitting the Jury to consider the reputation of Aubrey Aeby, although same had not been put in issue and in its rulings, permitting the witness, J. E. Spillman, to testify as an expert against both Petitioners when he had not been qualified as such by the Government who offered him as a witness, and in further permitting the Government to comment upon the failure of Norene Aeby to testify when she had not been offered as a witness in her own behalf. The decision of the United States Court of Appeals further sanctioned the wholly and totally inadequate charge to the Jury by the Trial Court. The dissenting opinion of Chief Judge Hutcheson wherein he says, "Not a syllable of the direct, and not a single shred of the circumstantial evidence points to Aubrey Aeby's guilt" supports Aubrey Aeby's contention that the Trial Court and the United States Court of Appeals was in error in holding the Petitioner Aubrey Aeby's Motion for Judgment of Acquittal should have been sustained.

Petitioners contend that by reason of the matters and things hereinabove pointed out in support of this, their

petition, that they have both been deprived of a fair and impartial trial and that their conviction by a Jury under the circumstances has been brought about by the errors in judgment of the Trial Court which causes the Jury verdict of guilty, to be tantamount to mob law, ultimately resulting in their being deprived of their liberty without due process of law as that term is defined by the Fifth Amendment to the United States Constitution. This is certainly true as to Petitioner, Aubrey Aeby. Petitioner, Norene Aeby admits that if it is held that the witness, J. E. Spillman's testimony should stand against her, then her Motion for Judgment of Acquittal by reason of the insufficiency of the evidence would not be good. In the event that this Court should sustain the United States Court of Appeals with reference to the qualifications of the witness Spillman, then this Petitioner, Norene Aeby relies upon the errors as to the prejudicial testimony admitted against her and the fact that her failure to testify was commented upon by the Government and allowed to stand before the Jury although a Motion for a Mistrial was made by her Attorney.

On the aforesaid grounds, it is respectfully submitted that this petition for writ of certiorari as to both Petitioners should be granted.

Respectfully submitted,

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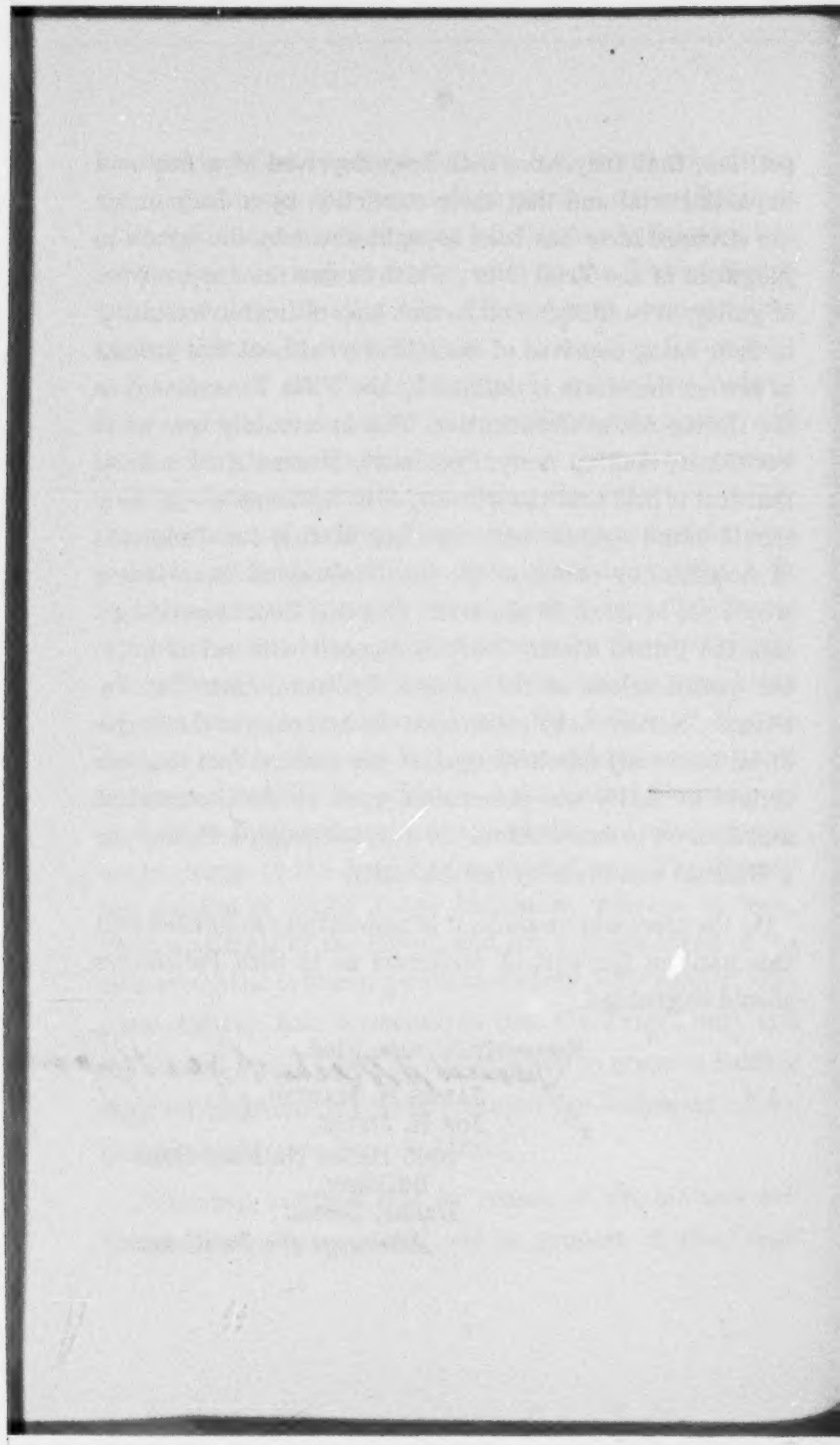

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UNITED STATES OF AMERICA,
Respondent.

BRIEF IN SUPPORT OF PETITION

To the Honorable, the Supreme Court of the United States:

REFERENCE TO THE OPINION OF THE COURT OF APPEALS, FIFTH CIRCUIT

The opinion of the Court of Appeals, affirming Appellants conviction, was rendered on June 30, 1953. The opinion is as follows:

Before HUTCHESON, Chief Judge, and BORAH and RUSSELL, Circuit Judges.

RUSSELL, Circuit Judge: Appellants, Aubrey Aeby and Norene Aeby, are husband and wife and prosecute this appeal from their conviction of the offenses of, (1) knowingly

receiving and concealing 191 grains of heroin which had been illegally imported into the United States, the defendants well knowing of such unlawful importation,[1] and, (2) knowingly purchasing 191 grains of heroin not in or from the original stamped package and which did not have affixed appropriate tax-paid stamps as required by the Harrison Narcotic Act.[2] Upon information filed that each of the defendants were second or subsequent offenders, Aubrey Aeby, the husband, was sentenced to imprisonment for a period of 20 years, and Norene Aeby, the wife, was sentenced to imprisonment for 10 years.

By errors specified, and here insisted upon, the appellants bring into review the sufficiency of the indictment, the sufficiency of the evidence to support the convictions, the adequacy of the instructions of the court to the jury, allegedly prejudicial statements and questions of the United States Attorney during the progress of the trial, and failure of the court to declare a mistrial because of prejudicial statements of a government witness when testifying, as well as objections to the admission of evidence by a witness who, it is claimed, was not properly qualified as an expert.

We find the indictment sufficient to withstand the attacs against it. The first count is attacked because it does not charge that there was a fraudulent "receiving and concealing" of the illegal heroin. This count does charge that the defendants did "knowingly" receive and conceal the heroin, knowing the same to have been unlawfully import-

[1] Section 174, Title 21, U. S. C. A.
[2] Section 2553(a), Title 26, U. S. C. A.

ed. The statute (21 U. S. C. A., § 174) seeks to punish one who fraudulently or knowingly imports the narcotic drug or receives and conceals it after being imported with knowledge of its illegal importation. The first count of the indictment which charges the offense of knowingly receiving the heroin with knowledge of its unlawful importation plainly states an offense under the statute. The second count charges the defendants did unlawfully "purchase and have in their possession" 191 grains of heroin not in or from the original stamped package and which did not have affixed appropriate tax-paid stamps. Seizing upon the words "and have in their possession," appellants argue that the offense sought to be charged by it is not in fact the offense prohibited by the statute. It is true that the possession of the prohibited drug is what raises the *prima facie* evidence "of a violation of this subsection [2553(a)] by the person in whose possession same may be found." However, the offense is the purchasing of the prohibited drug "except in the original stamped package or from the original stamped package." This essential of the offense is contained in the charge and the allegation as to possession, while irregular, does not render this count of the indictment defective. Nor are we shown how its inclusion could have prejudiced the defendants, especially since the separate offense of possession set forth in *Section 3224 of Title 26, U. S. C. A.* relates to possession of drugs by persons who have not registered or paid the special tax and clearly it is not this offense which can in anywise be said to be included within the indictment so as to bring about the inconsistency and contradiction urged by the defendants.

We find in the evidence in the record sufficient basis in facts and circumstances to support the verdicts of guilty returned by the jury. Neither defendant exercised the privilege of becoming a witness. The evidence for the government, thus uncontradicted, presented a case where, after the residence of defendants had been under observation for some thirty days, on the early morning of the date of arrest, after the defendant husband had been seen to leave the home at about 4:30 in the morning to go to work, a detective observer and two others, all members of the Dallas, Texas, detective force, acting with a search warrant, entered the home of the defendants and found the wife, Norene Aeby, asleep in bed. No person approached the house between the time the husband left and the time of the officer's entry into the house. So the jury could find that the articles and conditions discovered in the house existed at the time of the husband's departure and were known by him. Upon awakening and arresting Norene Aeby, it was found that there was pinned to her gown a rubber finger stall containing 191 grains of substance testified to be heroin. Throughout the house the officers found gelatin capsules, cellophane bags, rubber finger stalls, hypodermic needles, rubber gloves with some of the fingers removed, delicate scales, and spoons. The scales, spoons, finger stalls and hypodermic needles had traces of heroin on them. Some of these articles were on tables in the kitchen, visible in the bathroom, and the scales were in the kitchen cabinet. So far as appears the husband and wife were the only occupants of the house. We think it clear from the evidence that the situation was such that the number and location of the

paraphernalia and articles and the unusual nature of the articles, as well as the evidence of rubber gloves with fingers severed, was such as to justify a conclusion that more was involved than an unfortunate case of a wife who was an addict which the husband might tolerate, and to justify a conclusion by the jury, if they were so convinced, that the husband of the household participated in the receipt and concealment of the large quantity of heroin found in the actual possession of the wife in the home, as well as in its purchase not from the original package. In other words, that such heroin was also in his possession, and thus raise *prima facie* evidence of violation of the statute charged.

Our statement that the jury was authorized to find that the substance in the finger stall on the person of Norene Aeby and traces of which were found on the other articles referred to was heroin evidences our rejection of the contention of the defendants, urged after conviction, that there was no legal proof that the substance was heroin because of the failure of the evidence to show that the government chemist who testified that it was heroin was qualified as an expert. When this witness was shown to be a chemist employed by the Alcohol Tax Division in New Orleans, and he proceeded to identify the government's exhibits and as to making a test of them when they were received "by registered mail at our laboratory in New Orleans," and that the substance in the finger stall contained approximately 191 grains of heroin, defense counsel stated only, "We object to that." Upon later objection, the Court inquired, "What is the objection," to which counsel replied, "It is irrelevant

and immaterial, and we have objected to the introduction of the exhibits, heretofore, and we do not want to waive any matter in the record." At the conclusion of this witness' testimony, counsel again stated, "We object to the testimony," and asked the court to instruct the jury not to consider it for any purpose. The objections urged entirely fail to present the point now urged and the court was in nowise informed of defendants' present contention that the qualification of the witness to testify as an expert had not been shown. The objections of irrelevancy and immateriality were plainly not good. If the qualifications of the witness had been challenged, opportunity would have been presented to develop the matter further. The question not having been raised upon the trial, it can not now avail the defendants. Furthermore, in the absence of any question being raised at the trial, we think that at least *prima facie* a chemist employed by the Alcohol Tax Division who was designated to test and analyze government exhibits would qualify as an expert.

In view of the nature and elements of the offenses and the manner in which these were charged in the indictment, we perceive no necessity for the court stating to the jury the terms of the statute under which the prosecution was proceeding. Indeed, in a case like the present the substantial question is whether the defendant is shown to have, or have had, possession of the narcotic drug, for such possession is deemed sufficient evidence to authorize conviction, unless the defendant explains the possession to the satisfaction of the jury,[3] or, as stated in Section 2553(a),

[3]Section 174, Title 21, supra.

supra, "the absence of appropriate tax-paid stamps from any of the aforesaid drugs shall be *prima facie* evidence of a violation of this subsection by any person in whose possession same may be found." The Court charged the jury upon the question of possession and also instructed the jury that even if there was possession in one's house, if "you knew nothing of it, you would not be criminally responsible for it," and charged that if the jury found "that the defendant Aubrey Aeby had no knowledge of the presence of these drugs there in his wife's possession and in his house, then it would be your privilege and your duty to acquit him." We find no error in the Court's charge on the law of a principal in an offense and in connection therewith on aiding and abetting. In the latter connection, the Court instructed the jury that to constitute an aider or abbettor it was essential that such person "should share the criminal intent with the principal, or the party who actually commits the offense" and further, "So, if you find and believe that one of the defendants, the defendant Norene Aeby, is guilty as charged in the indictment, and you further find that the defendant Aubrey Aeby had actual knowledge of her conduct, and that he aided and abbetted her in carrying on such work, then he would also be guilty under the law. If he had no knowledge of her conduct and her acts, he would not be guilty, and should be acquitted." We think the charge of the Court sufficiently presented to the jury the principle that the jury must believe that the actual possessor of the heroin was guilty and that the defendant Aubrey Aeby must have had knowledge of, and participated with her in, the commission of the offenses charged before he should be

convicted. In view of the general charge of the Court, the refusal of the defendants' requested charges 2, 4 and 5 on the subject of possession was not error. While the remaining requested instructions in some parts contained statements of pertinent law, these are co-mingled with unsound and incorrect legal and factual propositions and the Court was not required to sift the good from the bad and present the good to the jury, especially where the general charge covered the real issues in the case.

We do not condone the query of the government's attorney in propounding the question to the defense witness as to his knowledge of Aubrey Aeby's reputation, nor to his interjecting the objection to testimony by another witness if the defendant was "not going into his reputation," nor the objection by government's counsel to testimony on behalf of the defendants which could be construed as a comment upon the defendant Norene Aeby's failure to take the stand as a witness. However, no testimony in response to the question or statements was given and the court sustained the objection to the question and cautioned the jury to disregard the suggestions and objection of the district attorney. Under the circumstances here, we do not think there was any sufficient cause to grant the defendants' motion for a mistrial. The same is true as to the overruling of a motion for mistrial based upon the prejudicial statement of the government's witness that he knew the defendant "had let women take the rap for him before." The Court told the jury that this statement should be disregarded and expunged from the record. The trial judge, of a necessity,

must have a discretion in dealing with such matters which will probably arise during the progress of a trial. We do not find in this case that the failure to declare a mistrial constituted an abuse of discretion, though we, ourselves, might have adopted more stern measures of rebuke.

We have carefully considered defendants' other assignments of error and these present no cause for reversal.

JUDGMENT AFFIRMED.

HUTCHESON, Chief Judge, concurring in part and dissenting in part:

I concur in the opinion in the judgment of affirmance as to appellant Norene Aeby. I dissent from it as to appellant Aubrey Abbey.

As I read the record, all of the direct, and every tendency of the circumstantial evidence points conclusively to Norene's guilt. Not a syllable of the direct, and not a single shred of the circumstantial, evidence points to Aubrey's.

Where, as here, a conviction calls for an automatic twenty year sentence, courts should at least be certain that the conviction rests on evidence and not on mere conjecture. Believing that the judgment should be reversed as to appellant Aubrey Aeby for want of evidence to sustain the conviction, I respectfully dissent from its affirmance as to him.

A True copy:
Teste:

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Clerk of the United States Court of Appeals for the Fifth Circuit.

JURISDICTIONAL STATEMENT

Jurisdiction is invoked under *Section 1254, Title 18, U. S. C.* The opinion of the Court of Appeals, Fifth Circuit was filed June 30, 1953. Petition for rehearing was by the Court of Appeals denied on August 26, 1953, without written opinion, thereby making the judgment a final judgment and no further remedy is available to Petitioners other than to have this Honorable Court review the decision of the Court of Appeals.

STATEMENT OF THE CASE

Appellants, Norene Aeby and Aubrey Aeby, husband and wife, on the 26th day of June, 1952, were living together at 2605 Ledbetter Drive in the City of Dallas (R. 63). Appellant, Aubrey Aeby, owned and operated the Cello Produce Co., near the intersection of Pearl and Cadiz St., Dallas, Texas (R. 112-115, 116-120), and had been operating this place of business for about one year (R. 112-120), and prior to that, he operated a Garage on Industrial Blvd. (R. 116). Prior to the 26th day of June, 1952, Police Officers, H. W. Totten, Joe Slovac and W. P. Gannaway had under surveillance for a period of about thirty days, the home of the Appellants at 2605 Ledbetter Drive (R. 64). About 4:20 A. M. on the morning of the 26th of June, 1952, Officer H. W. Totten, who was watching the house saw a light turned on and then saw Aubrey Aeby leave the premises in a pick-up truck (R. 57) and this officer testified that he knew that Aubrey Aeby was going to work at his place of business on the market in Dallas, Texas (R. 58).

With Appellant on this occasion was George Seal, who drove the truck (R. 57-120). This truck was a company truck that they had been using going to work together for more than a year (R. 120). George Seal did the driving for the reason that Appellant, Aubrey Aeby had no driver's license (R. 57). This fact was well known to Officer Totten (R. 57). On the morning in question George Seal had walked down to Appellant's house, in order to drive the truck and to take Aubrey Aeby to his place of business. After Appellant, Aubrey Aeby had left his home at about 6:30 A. M., the three officers, Totten, Slovac and Gannaway surrounded his home (R. 64-65). They knocked on the door and there being no response, entered the house and found Norene Aeby asleep in bed (R. 25-53). She was arrested and searched. Underneath her nightgown and pinned to it was a rubber finger stall (R. 25-53), Government's Exhibit No. 1, the contents of which, the Government contends, was 191 grains of heroin (R. 106). Appellants contend the Government had not proved that it was heroin. Appellant, Norene Aeby was taken to jail and then Officers Gannaway and Totten proceeded to Appellant, Aubrey Aeby's place of business and about 8:30 A. M. in a cafe nearby at the corner of Pearl and Cadiz Sreets Aubrey Aeby, who was drinking a cup of coffee, was arrested by said officers. (R. 49-50.) Appellant, Aubrey Aeby was taken and there searched but no narcotics of any kind or character were found on him (R. 50-51) and at the time of his arrest Aubrey Aeby, told Officer W. P. Gannaway that he knew nothing about the alleged narcotics found upon his wife (R. 85-86). Officer Gannaway testified before the Commissioner

that Appellant, Aubrey Abey told him at the time of the arrest that whatever narcotics had been found on his wife, if any, was wholly unknown to him (R. 86). At the time the officers arrested Norene Aeby they made a search of the house. In the bathroom they found three spoons and some cotton (R. 31). This was Government's Exhibit No. 2. The three spoons had a black substance on the back of them (R. 33) and Officer Totten said that it had been his experience as a Police Officer to have observed the same type of spoons used by narcotic addicts (R. 34). Government's Exhibit No. 3 was a hypodermic syringe found by the officers on the kitchen sink (R. 35). Government Exhibit No. 4 was rubber finger stalls, said by the officers to have been found in the house, three of which were found in the kitchen cabinet drawer and one was found in the back bedroom and one was found in the front bedroom (R. 36-37). Government Exhibit No. 5 is what officers found in the house and is described as cellophane bags (R. 39). Government's Exhibit No. 6 was some gelatine capsules and a hypodermic needle alleged to have been found by one of the officers on the kitchen table (R. 42). A part of Exhibit No. 6 was a pair of rubber gloves and parts of rubber gloves with their fingers cut out (R. 42). Officer H. W. Totten testified, over objections, that in his experience as a Police Officer, the capsules and other paraphernalia he had identified, and had seen, had been used by narcotic agents (R. 42-43). Government's Exhibit No. 8 was a photographer's scale which was found by the officers in the kitchen cabinet (R. 108-45). The Government offered J. E. Spillman as a witness who testified that he had seen Government's Exhibits 1 to

8; that he had received them by registered mail at "Our Laboratory in New Orleans" (R. 105). The said J. E. Spillman testified that his occupation was that of a chemist, employed by the Alcohol Tax Division at New Orleans and said that he had made a test of Government's Exhibit No. 1 and that it was about 191 grains of heroin hydrochloride (R. 106). This witness testified to having made the test and his conclusions drawn from such tests over the strenuous objections of Appellants. The said J. E. Spillman, although offered as an expert witness, at no time qualified himself as such; said witness, still not having been qualified as an expert and over Appellants objections said that he made tests of the spoons, being Government's Exhibit No. 2, and found a slight deposit of heroin on each one (R. 107). Said witness, still not having been qualified as an expert and over Appellants objection, was by the Court permitted to testify that he made an examination of part of Exhibit No. 3 which was two pieces of rubber finger stall and that he found traces of heroin inside (R. 108) and a part of the same exhibit, the hypodermic needle, according to said witness, showed traces of heroin in it. Said witness examined Government Exhibit No. 8 and said that it was what was called a photographer's scale usually used by photographers for compounding solutions and measuring out chemicals (R. 108) and on the left hand side of said scales, he found a small trace of heroin and on the place where the left hand goes, also a small deposit of heroin (R. 109). This witness had not qualified as an expert witness and Appellants objected to all of this testimony and at the conclusion thereof,

made a motion to exclude the same and that the Jury be instructed not to consider any portion of same (R. 110).

SPECIFICATIONS OF ERROR

1. The Court of Appeals, Fifth Circuit, erred in affirming the Judgment of the Trial Court for the reason that the Petitioner, Aubrey Aeby has been deprived of his liberty without due process of law, contrary to the Fifth Amendment of the Constitution of the United States, because there is not one scintilla of evidence, either direct or circumstantial in the record to support the verdict of the Jury as to the said Aubrey Aeby, therefor, his Motion for Judgment of Acquittal should have been granted and the Court of Appeals should have reversed the case because of the failure of the Trial Court to do so.

2. The Court of Appeals, Fifth Circuit, erred in affirming the Judgment of the Trial Court because Petitioner Aubrey Aeby was deprived of a fair and impartial trial in that the Government was permitted over his objections to place his reputation in issue before the Jury when it had not been put in issue by the Petitioner, and the Trial Court refused to grant a Mistrial because of such conduct on the part of the prosecution and the Court of Appeals erred in condoning such by the affirmance of the Judgment of the Trial Court.

3. The Court of Appeals erred in affirming the judgment of the lower court because the Petitioner, Aubrey Aeby was deprived of a fair and impartial trial when the Trial Court permitted the Government to put in evidence before the

Jury, over the strenuous objection of Petitioner, highly prejudicial testimony about him to the effect that he had previously "Let Women Take the Rap for Him Before," and in condoning the action of the lower court in failing to declare a mistrial when such prejudicial testimony was injected in the case.

4. The Court of Appeals, Fifth Circuit, erred in affirming the judgment of the Trial Court because the Petitioner, Norene Aeby was deprived of her liberty without due process of law in that she was convicted without sufficient evidence, the sufficiency of same being attacked by Motion for Judgment of Acquittal, which was overruled by the Trial Court, in that the Government had failed to prove that the alleged heroin was such and in the failure of the Trial Court to suppress the testimony of an expert who had not qualified himself.

5. The Court of Appeals erred in affirming the judgment of the Trial Court because Petitioner, Norene Aeby was deprived of a fair and impartial trial in that the Government was permitted over the timely objection of Petitioner, to comment upon her failure to testify before the Jury, she not having testified in her own behalf and said Court of Appeals condoned the action of the Trial Court in refusing to declare a mistrial because of such conduct.

6. The Court of Appeals erred in affirming the judgment of the lower court because both Petitioners were deprived of a fair and impartial trial in that the Government was permitted to use a witness, J. E. Spillman, to prove the al-

leged contraband was heroin when the said J. E. Spillman had not qualified as an expert, either by education or experience, over the objection of the Petitioners and at the conclusion of his testimony the Trial Court overruled a Motion to Strike his Testimony. The Court of Appeals fell into error in condoning the action of the Trial Court in its failure to sustain a Motion for Judgment of Acquittal and in its failure to sustain the motion to strike from the record, the testimony of the said J. E. Spillman.

7. The Court of Appeals erred in affirming the judgment of the Trial Court because the Trial Court's instructions to the Jury was wholly insufficient because their position before the Jury was in some parts wholly separate and distinct and the Court's charge operated to their great prejudice; the Court's charge to the Jury was so wholly inadequate as to deprive them of a fair trial and the Court of Appeals fell into error in condoning and approving the wholly inadequate instructions to the Jury by the Trial Court which totally and wholly failed to protect the rights of the Petitioners.

8. The Court of Appeals erred in affirming the judgment of the Trial Court because the indictment on which these Petitioners were convicted was insufficient and contained allegations which were highly prejudicial and was raised in their Motion to Dismiss the Indictment or in the alternative to delete from the second count the words "And Have in Their Possession" which was overruled by the Trial Court. The conviction of these Petitioners upon a faulty worded Indictment and the count which contains prejudicial al-

legations which tended to mislead the Jury, completely deprived the Petitioners of a fair and impartial trial and the Court of Appeals fell into error in condoning the action of the Trial Court in its failure to dismiss the Indictment, or in the alternative to delete from the second count thereof the prejudicial and misleading allegations to-wit: "And Have In Their Possession."

ARGUMENT

1. As to Petitioner Aubrey Aeby, his conviction in this case is clearly repugnant to the Fifth Amendment of the United States Constitution. It is fundamental that a conviction can not stand without evidence of some sort to support it. In this case, there was neither direct nor circumstantial evidence that Petitioner, Aubrey Aeby had anything whatsoever to do with the alleged 191 grains of heroin. The alleged contraband was found pinned to the night gown of Norene Aeby and was in her exclusive possession. While the Trial Court charged the Jury on aiding and abetting there was absolutely no evidence that the Petitioner Aubrey Aeby aided or abetted or assisted in any way in the commission of this alleged crime.

Jury's verdict cannot be predicated on conjecture, surmise or speculation. *Federal Digest, Evidence Key 597 (Vol. 30)*. Many cases cited.

In order to sustain a general verdict of guilty where the case has been submitted to the jury under two distinct

theories as to the guilt of the accused, the evidence must be sufficient to sustain a conviction upon either.

20 Amer. Jur., P., Section 1216, page 1068;

People v. Sullivan, 173 N. Y. 122, 65 N. E. 989, 63 L. R. A. 353.

The Government itself proved by the arresting officers that the Petitioner Aubrey Aeby had no knowledge whatsoever of the presence of the alleged contraband in the house, and knew nothing about the alleged narcotics found upon the person of his wife.

2. The Court of Appeals, Fifth Circuit, erred in affirming the Judgment of the Trial Court because Petitioner, Aubrey Aeby was deprived of a fair and impartial trial, because the Government was permitted, over his objections, to attack his reputation before the Jury when it had not been put in issue. It is elementary that the Government cannot attack the reputation or character of an accused until the accused first puts his reputation or character in issue. This well established rule protects the rights of the accused and requires the prosecution to convict on the accusation set forth in the Indictment, and not upon general principles. In *Boyd v. United States, 142 U. S. 450,* this Court said "However depraved in character, and however full of crime their past lives may have been, the Defendants were entitled to be tried upon competent evidence and only for the offense charged." If the above quote from this Court has any meaning at all, it means that it was the duty of the Court of Appeals, Fifth Circuit, to review the conviction of

Petitioners and determine whether or not his rights had been protected, whether they had been tried in accordance with the rules of criminal procedure. This was the holding in *MacKreth v. United States, 103 Fed. 2d 495; United States v. Modern Reed & Ratan Co., 159 Fed. 2d 656* and *Sang Soon Sur v. United States, 167 Fed. 2d 431.*

3. The Court of Appeals erred in affirming the judgment of the lower court because in condoning the action of the Trial Court in its failure to declare a mistrial after objection had been made to the Government putting before the Jury, highly prejudicial testimony to the effect that he "had let women take the rap for him before." Petitioners contend that when Policeman Totten made the unresponsive and prejudicial statement to-wit, "I knew he, Aubrey Aeby, had let women take the rap for him before," shown on page 60 of the Record, that no amount of instructions on the part of the Court could erase from the minds of the Jury this highly prejudicial and voluntary statement of the officer whose desires to convict by fair or foul play is evidenced by such statement. To protect the rights of these Petitioners, the Court should have declared a mistrial in this case. In support of Petitioners position in this matter, we call the Court's attention to the fact that the judgment of the Court of Appeals, Fifth Circuit, is in direct conflict with the following cases. *United States v. Dressler, 112 Fed. 2d 972; Josey v. United States, 135 Fed. 2d 809.*

4. Petitioner, Norene Aeby insists that the Court of Appeals, Fifth Circuit, erred in its judgment wherein it condoned the erroneous action of the Trial Court in failing to

declare a mistrial when the Government's Attorney commented on her failure to testify. This matter is shown in the Record on page 122. The Court waived the objection aside as if it was insufficient by saying he failed to see the relevancy but did say that it was her privilege not to testify and no one should comment upon it. *Section 3481, Title 18, U. S. C.* provides that in the trial of all persons charged with an offense against the United States, the person charged, shall at his own request, be a competent witness. His failing however, to make such request and be a witness shall not create any presumption against him. The Trial Court should have charged the Jury in accordance with the provisions of this Statute. Nowhere did he tell the Jury that Norene Aeby's failure to testify could under no circumstance create any presumption against her. The Jury has not been so instructed up to this time and we insist that her rights have been invaded and the Trial Court has failed utterly to protect her rights in not admonishing the Prosecuting Attorney, in the presence of the Jury, in order to emphasize the rights attending Appellant under this Article. She would be entitled to a fuller instruction on the matter by reason of her failure to testify in the absence of any comment thereon by the Prosecutor in order that the Jury might know the law with reference to this matter. Petitioners contend that the ruling of the Court of Appeals, Fifth Circuit, is in direct conflict with the rulings of the Court of Appeals in *Grantello v. U. S., 3 Fed. 2d 117* and is in direct conflict with *Johnson v. U. S., 318 U. S. 189* and *Wilson v. U. S., 149 U. S. 60*, being rulings of this Tribunal.

5. For convenience and brevity, the argument under paragraphs 4 and 6 of Specifications of Error will be merged. The Court of Appeals, Fifth Circuit, erred in affirming the judgment of the Trial Court as to both Petitioners Norene Aeby and Aubrey Aeby for the reason that the Trial Court admitted in evidence the testimony of J. E. Spillman, an alleged expert, who had failed to prove his qualifications by education, skill or experience to testify as to the analysis of the alleged contraband. The Court of Appeals in passing on this issue merely says that the witness, qualified himself when he stated that he was a Chemist employed by the Alcohol Tax Division in New Orleans. The Record is silent as to whether the alleged Chemist was a Graduate of any school, or had even attended any school, had any experience or any skill in the analysis of any contraband. The Court of Appeals chastised the Petitioners because their Counsel in their continuation of their objections being consistently overruled were finally asked by the Judge, "What is your objection" and complained that Counsel did not specifically point out to the Court in its objections that the Witness had not qualified himself as an expert. In this connection, we would call this Court's attention to the case of *U. S. v. Jones, 174 Fed. 2d 746*, it being an Opinion by the Court of Appeals of the Seventh Circuit speaking through Justice Minton, then a Judge of said Circuit, quoting therefrom Judge Minton says "That in itself would indicate that the Defendant is not required to go over the proof for the benefit of the Government or the Court, in the absence of a request for a more specific objection." Judge Minton continues, "Surely, the defendant does not have to lead the

Government through the various steps of the trial to insure a proper record for the Government to stand upon." A more specific objection than that which was given at the trial of this case, of course, would make absolutely void and useless the object of objecting and would penalize the Petitioner, because the Government did not know how to try its own case and fully develop the fact that the alleged expert witness was qualified to give his testimony on such matters. It is the contention of Appellants that when a witness is offered as an expert on a matter in issue, his competency, and qualifications, with respect to the special skill or experience is to be determined by the Court preliminary to the admission of his testimony. It is the contention of Appellants that it was the duty of the Court to determine first, whether the witness, Spillman, was qualified to give the testimony the Government sought to bring before the Jury by showing that he had attended some school or college or had some experience in analyzing commodities of this sort. The failure of Petitioners to object more specifically did in no wise qualify the alleged expert witness and certainly when an objection was made and the Court did not see fit to qualify him in face of such objections, the mere fact that the objection was not specific and did not call their attention to the fact that the witness had not up to that time qualified does not make such witness a qualified expert and would not authorize a Trial Court to permit his testimony to go before the Jury. In permitting this, the Court deprives the Petitioners of something that is guaranteed to him by the Constitution of the United States in that they have been tried and convicted without due process of law and that

their trial has resulted in their liberty being taken from them or being deprived of it without a fair and impartial trial. The ruling of the Court of Appeals in connection with this point is in conflict with decisions of other circuits, to-wit: *Hodge v. United States, 13 Fed. 2d 596*, and *United States v. Miller, 61 Fed. 2d 947.*

6. The Court of Appeals fell into error in affirming the judgment of the Trial Court because the Trial Court's instructions to the Jury were wholly insufficient and inadequate. Petitioners have been convicted and their liberty taken from them without due process of law and without a fair and impartial trial because of the inadequate instructions to the Jury. The Jury has no other source from which it can receive the law other than from the Trial Court. It is elementary that if the Court fails to adequately instruct the Jurors on the law of the case, the Defendants have been deprived of a fair trial. The charge in this case left the Jury to conjecture. No definitions were given, no explanations of the law were made. The Statutes involved were not even read or explained to the Jury. In view of the exceptions made by Petitioners to the charge which were ignored by the Trial Court and its refusal of such requested charges, Petitioners contend that they have been deprived of a fair trial. The word possession was not even legally defined. The Court's definition of possession was erroneously applied to the law and to the facts. The failure of the Trial Court to give Petitioners requested charges and the erroneous and inadequate charge which was given is tantamount to the Petitioners having been tried and convicted without

a Jury Trial. This contention is supported by decisions of other Circuit Courts wherein they are in direct conflict with the opinion of the Court of Appeals for the Fifth Circuit. In this connection, Petitioners cite *Morris v. United States, 156 Fed. 2d 525; United States v. Levy, 153 Fed. 2d 995* and *Nobel v. United States, 155 Fed. 2d 315.* We also cite a decision which is in conflict with the opinion herein as determined by the Fifth Circuit, to-wit: *Cambell v. United States, 167 Fed. 2d 451.*

7. Petitioners contend that no conviction should be had upon a faulty or invalid indictment. The written motion to dismiss the Indictment having been overruled by the Trial Court made it mandatory that the protection guaranteed to Petitioners to a fair and impartial trial, be reviewed by the Court of Appeals and that Tribunal protect the rights of Petitioners. The First Count of the Indictment was invalid and faulty in that it did not charge an offense against the United States because it nowhere charged that the receiving and concealing of the narcotics which had been imported into the United States illegally had been "Fraudulently" received and concealed by the Petitioners. This is a requisite or an essential ingrediant of the offense charged. The Second Count of the Indictment was vague and ambiguous, uncertain and inadequate in that it attempted to charge an unlawful purchase of 191 grains of heroin and in the charging part or the allegations of said Second Count it merely said "Purchase and have in their possession" 191 grains of heroin, thereby adding to and making a part of the Indictment the highly prejudicial phrase "and have in

their possession" 191 grains of heroin, which would mislead and excite the Jury into the belief that possession of such heroin was violative of some National law whereas in truth and in fact there is no such penal law of the United States. The possession of a Narcotic being only prima facie evidence that the possessor did not pay the tax thereon, or it might be prima facie evidence that it had not been received by him from and out of the original stamped package, but certainly no possession should be pleaded in the Indictment because it is confusing and misleading to the Jury, thereby leading them to the belief that if they found that the Petitioners were in possession of a narcotic that is all the inquiry and the only finding that they need make. Petitioners rely upon *Blockburger v. United States, 284 U. S. 300* for the authorities in this connection as well as *Kalos v. U. S., 9 Fed. 2d 268.*

8. Petitioners say that their conviction and sentence is invalid and should be set aside for the reason that the sentencing of Petitioners and especially Petitioner, Aubrey Aeby is void, because the procedure to enhance punishment as prescribed by *Title 26, Sec. 2557, paragraph E, Section 1* thereof, was not complied with. Aubrey Aeby received a sentence of 20 years by the Court, even though a Jury was not impaneled as required by the Statute, to determine whether he was the same person who the Government alleged in its Information had been previously convicted. The Record, pages 14 and 16 reveal that the Appellants neither admitted nor denied their identity which is tantamount to a denial and when such took place, the Trial Court should

have impaneled a jury to establish their identity as the law under said section prescribes.

CONCLUSION

Petitioners urge that the Court of Appeals, Fifth Circuit, in its opinion, erred in failing to hold that Petitioners were deprived of a fair and impartial trial because of the many errors in the admission of highly prejudicial testimony, permitting the Government to comment upon the failure of one of the Petitioners to testify, prejudicial testimony with reference to one Petitioner having "Let some woman take the rap for him before," and the inadequate charge of the Court to the Jury, and the invalid sentence of 20 years as to Aubrey Aeby and invalid sentence of 10 years as to Norene Aeby, has sanctioned the departure by the lower court from the accepted and established standards for judicial proceedings and in its failure to protect the rights of accused of crime as if to require and call forth this Court's power of supervision and revision to the end, that uniformity of decisions be obtained and that the settled principles of judicial procedure, and safeguards long established as essential to a fair and impartial trial, be not broken down.

For all the grounds and reasons heretofore stated, these Petitioners say that their petition for writ or certiorari to the Court of Appeals for the Fifth Circuit to review the judgment of said Court, in affirming the judgment against these Petitioners entered in the United States District Court for the Northern District of Texas, Dallas Division,

is well supported in law and in fact, and ought to be allowed and granted and the case reversed.

Petitioners contend that their petition should be granted in order to resolve a conflict of the decision below with those of Courts of Appeal in other Circuits.

Respectfully submitted,

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In the Supreme Court of the United States

OCTOBER TERM, 1953

No. 354

AUBREY AEBY AND NORENE AEBY, PETITIONERS

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The opinion of the Court of Appeals (R. 144-150) is not yet reported.

JURISDICTION

The judgment of the Court of Appeals was entered on June 30, 1953 (R. 150), and an order denying a petition for rehearing was entered on August 26, 1953 (R. 162). The petition for a writ of certiorari was filed on September 17, 1953. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1). See also Rules 37(b)(2) and 45 (a), F. R. Crim. P.

QUESTIONS PRESENTED

1. Whether there was substantial evidence to support the conviction of petitioner Aubrey Aeby.

2. Whether the two counts of the indictment sufficiently apprised the petitioners of all the elements of the crimes charged.

3. Whether prejudicial errors were committed at the trial.

STATUTES INVOLVED

Section 2(c) of the Narcotic Drugs Act, 42 Stat. 596, as amended, 65 Stat. 767, 21 U. S. C. (Supp. V) 174, provides:

> Whoever fraudulently or knowingly imports or brings any narcotic drug into the United States or any territory under its control or jurisdiction, contrary to law, or receives, conceals, buys, sells, or in any manner facilitates the transportation, concealment, or sale of any such narcotic drug after being imported or brought in, knowing the same to have been imported contrary to law, or conspires to commit any of such acts in violation of the laws of the United States, shall be fined not more than $2,000 and imprisoned not less than two or more than five years. For a second offense, the offender shall be fined not more than $2,000 and imprisoned not less than five or more than ten years. For a third or subsequent offense, the offender shall be fined not more than $2,000 and imprisoned not less than ten or more than twenty years. Upon conviction for a second or subsequent offense, the imposition or execution of sentence shall not be suspended and pro-

bation shall not be granted. For the purpose of this subdivision, an offender shall be considered a second or subsequent offender, as the case may be, if he previously has been convicted of any offense the penalty for which is provided in this subdivision or in section 2557(b)(1) of the Internal Revenue Code, or if he previously has been convicted of any offense the penalty for which was provided in section 9, chapter 1, of the Act of December 17, 1914 (38 Stat. 789), as amended; section 1, chapter 202 of the Act of May 26, 1922 (42 Stat. 596), as amended; section 12, chapter 553, of the Act of August 2, 1937 (50 Stat. 556), as amended; or sections 2557 (b)(1) or 2596 of the Internal Revenue Code enacted February 10, 1939 (ch. 2, 53 Stat. 274, 282), as amended. After conviction, but prior to pronouncement of sentence, the court shall be advised by the United States attorney whether the conviction is the offender's first or a subsequent offense. If it is not a first offense, the United States attorney shall file an information setting forth the prior convictions. The offender shall have the opportunity in open court to affirm or deny that he is identical with the person previously convicted. If he denies the identity, sentence shall be postponed for such time as to permit a trial before a jury on the sole issue of the offender's identity with the person previously convicted. If the offender is found by the jury to be the person previously convicted, or if he acknowledges that he is such person, he shall be sentenced as prescribed in this subdivision.

Whenever on trial for a violation of this subdivision the defendant is shown to have or to have had possession of the narcotic drug, such possession shall be deemed sufficient evidence to authorize conviction unless the defendant explains the possession to the satisfaction of the jury.

The pertinent provisions of the Internal Revenue Code provide:

Section 2553(a). General Requirement.—It shall be unlawful for any person to purchase, sell, dispense, or distribute any of the drugs mentioned in section 2550(a) except in the original stamped package or from the original stamped package; and the absence of appropriate tax-paid stamps for any of the aforesaid drugs shall be prima facie evidence of a violation of this subsection by the person in whose possession same may be found; and the possession of any original stamped package containing any of the aforesaid drugs by any person who has not registered and paid special taxes as required by sections 3221 and 3220 shall be prima facie evidence of liability to such special tax.

[26 U. S. C. 2553(a).]

Section 2557 [as amended by the Act of November 2, 1951, 65 Stat. 767]. Whoever commits an offense or conspires to commit an offense described in this subchapter, subchapter C of this chapter, or parts V or VI of subchapter A of chapter 27, for which no specific penalty is otherwise provided, shall be fined not more than $2,000 and im-

prisoned not less than two or more than five years. For a second offense, the offender shall be fined not more than $2,000 and imprisoned not less than five or more than ten years. For a third or subsequent offense, the offender shall be fined not more than $2,000 and imprisoned not less than ten or more than twenty years. Upon conviction for a second or subsequent offense, the imposition or execution of sentence shall not be suspended and probation shall not be granted. For the purpose of this paragraph, an offender shall be considered a second or subsequent offender, as the case may be, if he previously has been convicted of any offense the penalty for which is provided in this paragraph or in section 2 (c) of the Narcotic Drugs Import and Export Act, as amended (U.S.C., title 21, sec. 174), or if he previously has been convicted of any offense the penalty for which was provided in section 9, chapter 1, of the Act of December 17, 1914 (38 Stat. 789), as amended; section 1, chapter 202, of the Act of May 26, 1922 (42 Stat. 596), as amended; section 12, Chapter 553, of the Act of August 2, 1937 (50 Stat. 556), as amended; or sections 2557 (b) (1) or 2596 of the Internal Revenue Code enacted February 10, 1939 (ch. 2, 53 Stat. 274, 282), as amended. After conviction, but prior to pronouncement of sentence, the court shall be advised by the United States attorney whether the conviction is the offender's first or a subsequent offense. If it is not a first offense, the United States attorney shall file an information setting forth the prior convictions. The offender shall have the op-

portunity in open court to affirm or deny that he is identical with the person previously convicted. If he denies the identity, sentence shall be postponed for such time as to permit a trial before a jury on the sole issue of the offender's identity with the person previously convicted. If the offender is found by the jury to be the person previously convicted, or if he acknowledges that he is such person, he shall be sentenced as prescribed in this paragraph.

[26 U. S. C. (Supp. V.) 2557.]

STATEMENT

After a jury trial, both petitioners were found guilty under both counts of a two-count indictment charging them with (1) receiving and concealing 191 grains of heroin, knowing them to have been illegally imported into the United States, in violation of Section 2 (c) of the Narcotic Drugs Act, 21 U.S.C. 174, *supra,* pp. 2-4, and (2) knowingly purchasing 191 grains of heroin not in the original stamped package, and on which the tax had not been paid, in violation of Section 2553(a) of the Internal Revenue Code, *supra,* p. 4 (R. 1-2, 12-16). Petitioner Aubrey Aeby was sentenced to twenty years' imprisonment (R. 12-14), and petitioner Norene Aeby to ten years' imprisonment, both coming under the provisions of Section 2(c), *supra,* pp. 2-4, and Section 2557 of the Internal Revenue Code, *supra,* pp. 4-6, as persons convicted more than three times of similar crimes. On appeal the judgments were affirmed, one judge dissenting as to petitioner Aubrey Aeby (R. 150).

The evidence for the Government may be summarized as follows:

For about thirty days prior to June 26, 1952, police officers of the city of Dallas, Texas, maintained surveillance a short distance from the house of petitioners. From their position, about 75 yards away, they could see anyone coming to or leaving the five-room house (R. 18-21).

On June 26, 1952 about 4:00 a. m., city detective Totten took a position near the house, and about 20 minutes later saw the lights go on inside (R. 22-23). About 4:30, just as it was getting light, he saw petitioner Aubrey Aeby, the husband of Norene Aeby, leave the house and drive off with another man in a small truck (R. 23, 52-53).

Officer Totten continued to watch the house and observed that no one else entered it thereafter (R. 47). Shortly after Aubrey's departure, two other city officers arrived on the scene with a search warrant permitting search of the premises for narcotic drugs (R. 26, 77, 98-100, Gov. Ex. 9). The three officers knocked on the door but no one answered. Then they went around to a side door which they found open, and they walked through the house to the front bedroom, where petitioner Norene Aeby was in bed asleep. She was put under arrest, and as the officers were placing handcuffs on her, they noticed a rubber finger stall pinned to the front of her nightgown (R. 25, 56, 64-65). This subsequently was found to contain 191 grains of heroin mixed with milk sugar (R. 106, Gov. Ex. 1).

The officers then searched the house. They found three spoons in the bathroom (Gov. Ex. 2, R. 31-32, 79), blackened in such a way as to indicate that a match had been applied to them (R. 83). In the kitchen they found a hypodermic needle and syringe on top of the sink (Gov. Ex. 3, R. 35), and elsewhere in the kitchen another hypodermic, a quantity of cellophane bags, gelatin capsules, rubber gloves (some with the fingers cut out), parts of other rubber gloves, and a set of delicately balanced scales (Gov. Ex. 5, 6, 7, 8, R. 38-45). Six more rubber finger stalls were found in the front and back bedrooms, and in the kitchen (Gov. Ex. 4, R. 37-38). Government witnesses testified that rubber finger stalls and cellophane bags are customarily used as containers for narcotic drugs, and that spoons similar to Government Exhibit 2, are used by narcotic handlers (R. 81-84).

A chemist employed by the Alcohol Tax Division in New Orleans, testified that he received Government Exhibits 1 to 8 by registered mail at the New Orleans laboratories and in addition to the heroin contained in the rubber finger stall (Gov. Ex. 1), he found through tests a deposit of heroin on the spoons, on pieces of another finger stall, on the hypodermic syringes, and on the pans of the scale (R. 107-109).

ARGUMENT

1. The contention of petitioner Aubrey Aeby that there was no substantial evidence to sustain the verdict as to him (Pet. 22), is refuted by the record. Between the time that Aubrey Aeby was

seen to leave his home, and the execution of a search warrant shortly thereafter, no one entered the house. When the three officers entered they found, in addition to the quantity of heroin concealed on the person of his wife, who had apparently been sleeping after his departure, the full paraphernalia of narcotics handlers distributed throughout the house in two bedrooms, in various places in the kitchen, and in the bathroom. The presence of burned spoons, large quantities of cellophane bags and gelatin capsules, delicate scales, rubber gloves, and other articles, points to the involvement by both occupants of the house in the activities there being performed. The jury had ample basis to infer that Aubrey Aeby, as head of the household, was well aware of, and participated in, the receipt and concealment of the large quantity of heroin, as well as its purchase in a container not in the original package.

Had petitioner been arrested before he stepped out of his house there would be no doubt that he was as much in possession of the large quantity of heroin as his wife. The fact that the search and arrest was made a short time subsequent to his leaving the house does nothing to destroy the inference that he was jointly in possession of the heroin with his wife. The evidence amply sustains the conclusion that nothing in the house had changed between Aubrey's leaving, and the execution of the search warrant by the officers.

Moreover, the trial court gave full instructions on the law relating to aiding and abetting (R. 127-

128). Clearly, as a minimal proposition, the evidence establishes that petitioner abetted the crimes committed by his wife. Such involvement suffices to sustain the verdict. See 18 U.S.C. 2.

2. Petitioners assert that the indictment was defective (Pet. 32-33). They contend that the first count failed to charge that the receiving and concealing was done "fraudulently" in addition to being done "knowingly" as charged. The statute, Section 2 (c) of the Narcotic Drugs Act, *supra*, pp. 2-4, requires a fraudulent or knowing state of mind only in the importation of the proscribed merchandise. The crime charged in the first count is defined by the following language of the same section:

> Whoever * * * receives, conceals * * * any such narcotic drug after being imported or brought in, *knowing* the same to have been imported contrary to law * * * shall be fined * * *. [Italics added.]

The scienter element of the crime charged is thus satisfied by proving a receiving and concealing of narcotic drugs *knowing* them to have been illegally imported. *United States* v. *Williams*, 202 F. 2d 712 (C.A. 5); *Shafer* v. *United States*, 179 F. 2d 929 (C.A. 9), certiorari denied, 339 U.S. 979. See also: *Arzaga* v. *United States*, 189 F. 2d 256 (C.A. 9). This the indictment specifically charged.

Petitioners also contend that the allegation in the second count based on 26 U.S.C. 2553(a), *supra*, p. 4, to the effect that they had narcotics "in their possession", was surplusage, and prejudicial.

However, since unexplained possession of such drugs without stamps, is made prima facie evidence of a violation of the section without the necessity of proving a purchase or sale (cf. *Casey* v. *United States*, 276 U.S. 413, 418) the averment, even though not essential, could not have prejudiced the petitioners.[1]

3. Petitioners also allege as trial errors various matters which, we submit, are patently misconceived.

a. The first such contention raised by petitioner Aubrey Aeby alone, is that (Pet. 22) "* * * the Government was permitted over his objections to place his reputation in issue before the Jury * * *." The fallacy of this allegation is demonstrated by reference to the record (R. 112-114). During the cross-examination of a policeman called as a defense witness to testify that petitioner Aubrey Aeby was engaged in a legitimate business, the witness was asked "Now, of course, you don't know anything about his reputation?" Defense counsel immediately objected before answer, the court sustained the objection, and instructed the jury that reputation was not in issue, and told them, in fact, that petitioner was presumed to have a good reputation. No testimony was thereafter introduced to impeach either petitioner's reputation.

b. Petitioners also contend (Pet. 22-23) that they were prejudiced by a statement made by officer Totten during cross-examination to the effect that petitioner Aubrey Aeby "* * * had let women take

[1] The general sentence as to each petitioner is sustainable on either count alone.

the rap for him before." The witness who had conducted the search on which the charges were founded was cross-examined as to his testimony given before the United States Commissioner concerning the circumstances of the arrest (R. 54-56, 58). The following occurred (R. 59-60):

Q. Now then, this question was asked you:

"And isn't it a fact this defendant, Mrs. Aeby, told you her husband Aubrey knew nothing about any narcotics being on the premises?"

And you answered: "That is right."

A. That is right.

Q. And she told you that he didn't know anything about it, that is right, isn't it?

A. That is what she told us.

Q. And that is what Aubrey told you when you arrested him, too, wasn't it?

A. No.

Q. Substantially that, I mean?

A. No, he didn't tell me that.

Q. Well, I believe you answered that question over in the—before the Commissioner, in this form, see, there your answer to the question was, "Well, he said, 'Well, if she got caught with something out there, she will have to rap for it' ".

Is that it?

A. She will have to take the rap for it.

Q. Is that right?

A. Yes, sir.

Q. In other words, leaving the inference with you, or that was substantially telling you that he didn't know anything about it, isn't that right?

A. Now, that isn't what it left with me.
Mr. May:
Go ahead and finish your answer.
A. I knew he had let women take the rap for him before.

The remarks of the witness now objected to (R. 59-60) were obviously responsive to the questions asked by the defense.[2] Moreover, immediately after the witness had answered the question the trial court instructed the jury to disregard the testimony about "taking the rap" (R. 60). It is not clear that it was incumbent on the court to expunge testimony which the defense had invited, but it is clear that this incident did not merit the granting of petitioners' motion for a new trial.

c. Petitioner Norene Aeby contends that the trial court allowed the Government to comment on her refusal to testify (Pet. 23). This contention apparently stems from a colloquy which occurred when Government counsel questioned the relevancy of a defense effort to prove that Mrs. Aeby had her own bank account. The following ensued (R. 122-123):

> Mr. Jones [defense counsel]: She has her own bank account. They are trying to contend that they had scales and were big operators, and that kind of business. We are going to show that she is an addict, and her husband cannot even check on her bank account. It is a circumstance, and that is all.

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[2] Petitioners now erroneously state that the trial court erred in permitting (Pet. 22-23) "* * * the *Government* to put in evidence before the Jury, over the strenuous objection of Petitioner, highly prejudicial testimony * * *." [Italics added.]

> Mr. May: If he wants to show she is an addict, she ought to get on the stand.
>
> Mr. Jones: We object to commenting on her failure to testify.
>
> The Court: I don't see the relevancy.
>
> I will state, however, it is her privilege not to testify, and nobody should comment on it.

It is clear from this dialogue that defense counsel gratuitously stated in open court that petitioner Norene Aeby was an addict, to which statement Government counsel objected. The court then instructed that petitioner had a privilege not to testify (R. 123), and in his final charge to the jury he reiterated this principle (R. 126). No prejudice could have resulted from these statements.

d. Petitioners contend that the witness who identified the seized substance as heroin was not properly qualified as an expert (Pet. 23-24). The witness testified that he was employed as a chemist by the Alcohol Tax Division in New Orleans, and that he received the exhibits by registered mail at the laboratories of that division. In the absence of any objection or cross-examination by the defense, these facts suffice to qualify the witness as an expert. The question of the qualifications of an expert rests largely in the sound discretion of the trial court, and the exercise of that discretion is not ordinarily disturbed on appeal. *Gila Valley R. R. Co* v. *Lyon,* 203 U.S. 465, 475; *United States* v. *German-American Vocational League,* 153 F. 2d 860, 865 (C.A. 3), certiorari denied, 328 U.S. 833; *Hodge* v. *United States,* 13 F. 2d 596, 599 (C.A. 6).

e. Petitioners assert (Pet. 33-34) that in sen-

tencing them, the trial court should have empanelled a jury to try the issue of whether the previous convictions of each for similar violations related to them or other persons. The short answer to this is that they did not and do not now deny that they were the persons to whom the previous convictions related. The statute requires a trial on the issue only if there is a denial of identity. See the provisions of Sec. 2(c) of the Narcotic Drugs Act, *supra*, pp. 2-4.

Petitioners make a catch-all objection to the charge to the jury (Pet. 31-32), which is refuted by a mere reading of the charge (R. 124-128). The instructions are a clear exposition of the law, calculated to inform rather than confuse the jury. The term "possession" was clearly defined in terms of common understanding. As the court below held, the charge "covered the real issues in the case" (R. 149).

CONCLUSION

For the foregoing reasons, we respectfully submit that the petition for a writ of certiorari should be denied.

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HAROLD B. WILLEY, C

In the

Supreme Court of the United States

No. 854

AUBREY AEBY and NORENE AEBY,
Petitioners,

v.

UNITED STATES OF AMERICA,
Respondent.

PETITIONERS' MOTION FOR REHEARING

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In the

Supreme Court of the United States

No. 354

AUBREY AEBY and NORENE AEBY,
Petitioners,

v.

UNITED STATES OF AMERICA,
Respondent.

PETITIONERS' MOTION FOR REHEARING

Now comes Aubrey Aeby and Norene Aeby, Petitioners, and file this their Motion for Rehearing and respectfully say to the Court in support of said Motion as follows:

Petitioners pray that the Order of this Honorable Court denying their Petition for Certiorari, made on the 16th day of November, 1953, be set aside and that the Court after due and further consideration of their case enter an Order granting their said Petition and review their judgment of conviction.

Petitioner Norene Aeby does not bring forth new matter but still urges the matters she gave in her Petition as reasons for allowance of the Writ of Certiorari.

Petitioner Aubrey Aeby, in addition to the reasons assigned in his Petition for Certiorari, says that this Court can and ought to grant his petition because he is being deprived of his liberty contrary to the previous decisions of this Court in like cases. In this connection Petitioner must again direct this Honorable Court's attention to the Statement of Facts. It is most earnestly urged here that his conviction is not supported in the evidence. It is most sincerely and earnestly urged here that the jury verdict was without evidence to support it and that the judgment affirming the case, rendered by the United States Court of Appeals was erroneous. Petitioner again directs this Honorable Court's attention to the dissenting opinion by Chief Judge Hutcheson and, we quote:

> HUTCHESON, Chief Judge, concurring in part and dissenting in part:
>
> "I concur in the opinion and in the judgment of affirmance as to appellant Norene Aeby. I dissent from it as to Appellant Aubrey Aeby.
>
> "As I read the record, all of the direct, and every tendency of the circumstantial, evidence points conclusively to Norene's guilt. Not a syllable of the direct, and not a single shred of the circumstantial, evidence points to Aubrey's.
>
> "Where, as here, a conviction calls for an automatic twenty-year sentence, courts should at least be certain that the conviction rests on evidence and not on mere conjecture. Believing that the judgment should be reversed as to appellant Aubrey Aeby for want of evidence to sustain the conviction, I respectfully dissent from its affirmance as to him."

Petitioner says that unless this Court grants him relief he will have to serve a sentence of 20 years in the penitentiary, convicted of an offense of which he is not guilty and of which no evidence was produced before the jury to support the verdict of guilty.

This Court has always reviewed cases where the sufficiency of the evidence is in question, even though both the trial court and the Court of Appeals have found adversely to the defendant. The power, authority and custom of this Court to examine the facts to ascertain the sufficiency thereof to support a conviction is so well settled, there is no necessity to cite authorities.

CONCLUSION

Petitioner Aubrey Aeby pleads most earnestly with this Honorable Court TO AGAIN EXAMINE THE EVIDENCE IT THIS CASE and he verily believes when the Court again examines the record, it will then be convinced that the evidence is wholly insufficient to support his conviction and that the Writ of Certiorari will be granted.

Respectfully submitted,

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